United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To Be Argued by
EVERETT B. LEWIS

75-4237

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

Intervenor.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S BRIEF

Dated: New York, N. Y.
January 7, 1976

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Statement

This brief is submitted in opposition to the petitioner's application for enforcement of its order as amended. Briefs in support of the NLRB's application have not yet been served upon the respondent.

The respondent Union represents a unit of Metropolitan New York City area technical employees of the Intervenor Sperry Rand Corporation ("Sperry") largely employed at the company's Great Neck, Long Island plant. In 1973, concerned with work preservation, the Union invoked the

grievance and arbitration provisions of its contract with Sperry to compel the company to apply contract standards to certain unrepresented employees working at Sperry's Vallejo, California plant.

Sperry filed an unfair labor practice charge with the National Labor Relations Board (Case No. 29-CB-1199) asserting that the respondent was, by invoking its grievance and arbitration procedure, attempting to represent the Vallejo employees, but the Board dismissed this charge in its entirety (202 NLRB No. 18). However, upon review, this Court held that the respondent had violated the Act and remanded the case to the Board "for further proceedings consistent with its opinion." *Sperry Systems Management Division* v. *N.L.R.B.*, 493 F.2d 63, 70 (1974), *cert. den.*, 419 U.S. 831 (1974).

It is deemed significant that neither the Board nor the Court found that the respondent had unlawfully attempted to expand or alter its unit within the Metropolitan New York City area. There was not even a request to modify the certified unit, much less pressure, threats or concerted activity of any kind to attain such a result. Plainly there was no egregious violation of the Act warranting an extraordinary remedy.

The first two paragraphs of the Board order deal directly with the Vallejo situation, and the respondent has heretofore proclaimed its willingness to comply with these ordering paragraphs:

> "(a) Using, or attempting to use, the grievance and arbitration procedures established by its collective-bargaining agreement with Sperry Systems Management Division, Sperry Rand Corporation, covering the

unit of Metropolitan New York City area employees described below, for the purpose of compelling Sperry Rand to apply the substantive terms of that agreement to unrepresented technical employees engaged by that Company at its Vallejo, California, plant.

"(b) In any other manner using the collective-bargaining process as established for the unit of the below-described employees as a means of protesting or otherwise determining the wages, hours, and working conditions of unrepresented employees at Sperry's Vallejo, California, facilities."

It might have been anticipated that the third paragraph of the order would preclude the Union from "attempting in any like manner to expand its established unit of Metropolitan New York City area employees to any other unrepresented employees outside of the Metropolitan New York City area." Instead inexplicably, indeed perversely, the Board in its paragraph (c) chose to preclude the Union from attempting to expand its Metropolitan New York City area unit beyond the classifications included in the original NLRB certification, with certain modifications:

"(c) Attempting in any like or related manner to expand its established collective-bargaining relationship beyond the bounds of the unit composed of the following employees:

[The Board here quotes the Metropolitan New York area unit description contained in the Board certification issued to the Union in 1962, augmented to include all of the classifications thereafter added to the unit and listed in the parties' 1970 contract.]"

The respondent objected to paragraph (c) of the Board's order on two grounds. First, that it does not accurately describe the classifications presently represented by the Union, and second that it would impose an unreasonable limitation upon the Union's right to seek the modification of its Metropolitan New York City area bargaining unit through the normal contract grievance-arbitration processes.

POINT I

Unit and representative status questions are proper subjects of grievance and arbitration.

As the affidavit of Henry Zylla, annexed to respondent's affidavit in opposition, plainly demonstrates, the Metropolitan New York City area bargaining unit has been repeatedly modified by a series of agreements between the parties. Several of these agreements were initiated by the filing of grievances under the grievance and arbitration provisions of the applicable collective bargaining agreement.

Seeking the modification of a certified bargaining unit has been sanctioned by the Board and the Courts. Thus in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964) the Court held a grievance to be arbitrable whether viewed as a representation or as a work assignment dispute, notwithstanding the fact that the Board also had jurisdiction over the matter.

Similarly, in *Raley's Inc.*, 143 NLRB 256 (1963), a leading Board decision, it was held that:

> "The same considerations which moved the Board to honor arbitration awards in unfair labor practice cases

> are equally persuasive to a similar acceptance of the arbital process in a representation proceeding such as the instant one. Thus, where, as here, a question of contract interpretation is in issue . . . and an award has already been rendered which meets Board requirements applicable to arbitration awards, we think that it would further the underlying objectives of the Act to promote industrial peace and stability to give effect thereto" (at 258-258).

It is beyond cavil that the respondent would be deprived of substantial contract rights if it is henceforth to be subject to the limitation upon its activities concerning its Metropolitan New York City area unit imposed by paragraph 1(c) of the Board's order. Plainly its violation of the Act entailed does not justify this harsh remedy. Cf. *I.L.G.W.U.* v. *N.L.R.B.*, 366 U.S. 731 (1961).

POINT II

The Court has ample power to revise the Board order under §10(e) of the Act.

The Court in this proceeding is not limited to granting or denying enforcement of the Board order in whole or in part. The question having been timely raised before the Board (*NLRB* v. *Local 476*, 368 U.S. 401 (1962)), this Court may adjust the relief ordered to the exigencies of the case in accordance with equitable principles. *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939).

Moreover, although Courts in reviewing Board orders should confine themselves to matters of law, and not encroach on the domain of policy, *NLRB* v. *Gullett Ginn Co.*,

340 U.S. 361 (1951), they should reverse or modify remedies fashioned by the Board to expunge the effect of unfair labor practices, where such remedies cannot fairly be said to effectuate the policies of the Act. *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943); see *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). Thus, in *H. K. Porter*, the Court stated:

> ". . . [i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties. . . . The Board's remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract" (397 U.S. at 107).

This is not to say that the Board may not broaden the remedies ordered beyond the facts giving rise to the immediate violation. Thus it would have been appropriate here to expand the territorial effect of the Board's order beyond Vallejo, California, *Longshoremen's Assn. Local 791*, 116 NLRB 1652, 1654 (1956). However, the Board remedy must be remedial only and not punitive in nature (*Republic Steel Corp.*, 311 U.S. 7, 10 (1940).

Pursuant to its powers under §10(c) of the Act, the Board may order any person found guilty of engaging in the unfair labor practices proscribed under §8 "to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of this Act." In the case at bar, however, the Board has attempted to impose restrictions on the respondent Union's

normal activities, having nothing whatever to do with unlawful acts of which the respondent has been found guilty. Paragraph (c) of the Board's Order is overbroad and punitive.

This Court in the past has stricken such overbroad Board ordered remedies. *J. P. Stevens & Co.* v. *NLRB,* 380 F.2d 292 (2d Cir. 1967); see *May Department Stores Co.* v. *NLRB,* 326 U.S. 376, 392-393 (1945). Indeed, the Board itself has geographically limited posting remedies. *Dover Corp.,* 211 NLRB No. 98; *Alberts Inc.,* 213 NLRB No. 94.

In *May Department Stores, supra,* the Court noted that the test of a proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent unfair labor practices. It is clear that the Board overstepped its bounds herein by encroaching upon normal and lawful collective bargaining.

Conclusion

For all the reasons hereinabove set forth the Board's Order should be appropriately modified.

Dated: New York, N. Y.
January 7, 1976

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above captioned case have this day been served by first class mail upon

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Dated at New York, New York
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